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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-853

UNITED STATES STEEL CORPORATION
and
U. S. STEEL HOMES CREDIT CORPORATION - - - - - - - - Petitioners

versus

FORTNER ENTERPRISES, INC. - - Respondent

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE RESPONDENT

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v.

FORTNER ENTERPRISES, INC., - - *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

A. Prior Proceedings

Petitioners correctly set forth the long history of the trials and appeals of this case. Unfortunately, that is about all they do in context.

Based on the 1969 Opinion of the Supreme Court in this case, 394 U. S. 495, in 1971 (452 F. 2d 1095) the Sixth Circuit held that there were fact issues con-

cerning the economic power issue of the tying claim for resolution by a jury and that the District Court's directed verdict for Fortner in 1970 on Liability was therefore not proper. The Sixth Circuit in footnote 4 at the end of its 1971 Opinion (452 F. 2d 1095, at p. 1103) points out that the entire range of evidence bearing upon the economic power issue should be considered by the jury upon retrial. This included *all* of Fortner's evidence as well as *all* of Petitioners' evidence.

By agreement, jury trial was waived, with the District Court to become fact finder. Respondent and the District Court thought this would bring an end to this thirteen year old case but Petitioners have continued to flail.

In 1975 the question before the Sixth Circuit was whether the District Court's *fact finding* of economic power was clearly erroneous.[1] It could hardly have been otherwise, since the Supreme Court and the Sixth Circuit had already decided that there were fact issues for a fact finder to resolve on the economic power issue.

Procedurally we should point out that no real legal issues were before the Sixth Circuit in 1975, since the law of the case had been established and the only legitimate question raised on appeal was whether the District Court's Findings were clearly erroneous.

Petitioners seek to narrow the findings and fragment them as they have persistently done in the past to no avail. For that reason, however, we feel com-

[1]Fortner Enterprises, Inc. v. United States Steel Corp., 523 F. 2d 961 (6th Cir., 1975).

pelled to set forth below a summary of the facts developed in this case as found by the trial court as fact finder.

B. The Facts

Land was available in southern Jefferson County, Kentucky, in an existing subdivision in 1959 and 1960, and this land was owned by a corporation in which A. B. Fortner had an interest. The Homes Division of United States Steel Corporation became interested in the project and in an effort to induce sales of their prefabricated house packages they had the Credit Corporation enter into negotiations with plaintiff for the purpose of offering financing assistance for land acquisition and development and construction funds for purchase and erection of the houses. The Credit Corporation offered plaintiff 100% of the cost of the land and cost of development (A 214-215), provided that it agree to purchase the United States Steel house packages for use in the subdivision (A 221). This offer of financing was unique, unusual and attractive to plaintiff. Mr. Fortner testified that he would not have agreed to purchase the U. S. Steel homes but for the financing offered (A 227).

As a result of the offer, notes, a mortgage and a loan agreement were executed in October, 1960 (A 44-74) in favor of the Credit Corporation. The notes were based on 6% interest and a fee or discount of one-half of 1%. The Loan Agreement specifically contained the tie-in provision requiring the plaintiff to purchase the house packages from United States Steel Corporation

and erect them on the lots in the subdivision (A 47). There is no dispute but that this was a tie-in agreement for the benefit of the third party defendant United States Steel Corporation.

These loans were offered to plaintiff under the so-called special financing program of the Credit Corporation and this program is explained in a letter from the president of Homes Division to the Assistant General Solicitor of United States Steel Corporation (PX 238; A 1275-1276), as follows:

> "Beyond the 'regular' program of financing assistance offered to qualified builders and negotiated by the Credit Corporation there exists a program of 'special' assistance which provides a greater amount of interim financing participation in selected markets with selected dealers. Fortner represents one of the latter. In these cases our sales department in an attempt to obtain distribution in a new market or to supplement distribution in an existing market, will discuss the possibility of a building program using U. S. Steel Homes with a dealer who is believed to have the necessary qualifications to be successful. Frequently the builder states a need for substantial interim financing to support the program and after commercial evaluation and a satisfactory preliminary check of credit and reputation, a recommendation is forwarded to U. S. Steel Homes Credit Corporation that negotitations be undertaken to arrive at a satisfactory basis for financing assistance consistent with the conditions which exist in each instance. In certain cases where Credit Corporation states that the amount of assistance provided in relation to the value of the security is beyond the normal limits of a purely financial transaction, Homes Division underwrites the financial transaction, Homes Division underwrites the arrangement so as to protect Credit against potential losses. Our agreement with Fortner is in this category."

Fortner Enterprises, Inc., obtained from the defendant, United States Steel and the Credit Corporation during the course of discovery numerous documents. Those pertinent to Fortner's case were introduced into evidence and constitute compelling and unrefuted evidence against the defendants.

The Homes Division of United States Steel made a presentation to the Finance Committee of United States Steel at its January 12, 1954, meeting (PX 1-M; A 1085). That recommendation was that a financing corporation be etablished to provide *construction money* and to *originate mortgages* for resale to investors (A. 1088-1089). It was specifically understood at that time that the proposed finance corporation ". . . will not be used as a means to force sales to dealer-builders" (Paragraph 2(b) PX 1-M; A. 1090). The Credit Corporation was established as a result of that authorization and presentation.

There was a change of policy in 1958. The Finance Committee Minutes (PX 1-W; A 1095-1096), in order to enable the Homes Division ". . . to attain a minimum distribution of 1,800 units in 1959, and such additional distribution as may be feasible . . ." authorized and directed the Credit Corporation to

make loans to dealers to effectuate the purpose ". . . without conformity with conventional or conservative patterns but within the bounds of prudent business judgment;" provided that the Homes Division underwrite and guarantee losses to a defined extent. This was the "special" financing program instituted by the Credit Corporation and it was continued through at least 1961 (A 1098).

A formal Underwriting Agreement was entered into between Homes Division and Credit Corporation dated March 30, 1962, covering those loans made under the special financing program which were still in existence as of that date and setting forth the procedure for the making of loans under the special financing program (PX 237; A 1268-1272). The procedure set forth therein was for Homes Division to request Credit Corporation to make a loan as a "financial risk" and if Credit Corporation refused then Homes Division would "direct" Credit Corporation to make a loan as a "commercial risk" in reliance upon the underwriting of the loan by Homes Division (A 1271).

The attachment to that Underwriting Agreement (A 1272-1274), lists the loans guaranteed by Home Division and this included the land acquisition loans to Fortner. It also listed the other land acquisition loans guaranteed by Homes Division under the special financing program according to the testimony of W. H. Lang, Prsident of the Credit Corporation (A 976 and 980). Twenty-nine of the forty-three loans guaranteed in that Underwriting Agreement involved over-all loans in excess of $250,000.00 (A 980; A 1194-1196). All of

the loans on the attachment to the Underwriting Agreement covered the high risk type loans under the special financing program (A 981).

The defendants admitted that Credit Corporation's loan commitments for 1960 were $22,625,805.00; for 1961 were $19,342.612.00 and for 1962 were $19,283,544 and that all such loan commitments with certain minimal exceptions totaling $627,000.00 ". . . involved loan agreements and/or mortgages which contained a provision or provisions requiring the borrower to purchase and erect on the land described therein house packages manufactured and sold by the Homes Division of United States Steel Corporation so long as the loan or loans or any portion thereof remained outstanding . . ." (A 742-743). The defendants own admission therefore was that *all* of its loans were conditioned upon the tie-in provisions complained of by Fortner Enterprises in this suit except a few small ones.

The defendants further admitted:

> "That the estimated percentages of total shipments of house packages by the Homes Division which were made to dealers receiving financial assistance from the Credit Corporation for the years 1960, 1961 and 1962, are as follows; 1960, sixty-eight percent; 1961, seventy percent; 1962, seventy-five percent." [A 742; 780]

Thus, in 1960 and 1961, 68% to 70% of all sales were accounted for by loans involving the tie-in.

Land financing loans outstanding alone amounted to $5,372,000 at the end of 1960 (A 1353), while house package sales amounted to $6,747,353 (A 1199). At

the end of 1961 land financing loans outstanding were $5,918,000 (A 1353), while house package sales were only $5,051,992 (A 1199).

A more significant fact is that the original amounts of the loans dated prior to the end of 1961 listed in the attachment to the Underwriting Agreement total $7,738,000 (A 1273-1274) well in excess of the total land financing loans outstanding at the end of 1961 of $5,918,000. As previously indicated, Mr. Lang testified that all the loans on the Underwriting Agreement were land financing loans of the special category.

Fortner Enterprises was one of the companies which was obtained as a dealer through the special financing program. The land loans were equal to 100% of the cost of the land acquisition and development and the loans were at 6% interest with a service fee on discount of one-half of 1%.

One of the key exhibits introduced in evidence was Plaintiff's Exhibit 240 obtained from United States Steel (A 1279-1299). This is a copy of a presentation given at a seminar for Homes Division personnel on March 27, 1961, by a Homes Division employee named Neil Day, Manager of Field Sales (A 440-445), as identified by Stanley Mack, Manager of the Sales Division of Homes Division during 1959 through 1962 (A 439). Mr. Mack read certain portions of that exhibit, which was also a part of the Homes Division Sales Manual during the course of his testimony (A 445-449).

Plaintiff's Exhibit 240 first points out that any land acquisition and development loan is a higher risk loan

(A 1287), and the regular Credit Corporation loan of that nature was 60% of the cost of land and development (A 1288). The exhibit goes on to point out that Credit Corporation's land acquisition and development loans were based on 6% interest and one-half point fee which was very attractive compared to other manufacturers who charged a 10% fee or more in addition to simple interest (A 1291). This exhibit points out that the special financing program was in effect and was negotiated on a dealer by dealer basis with that program by that time having been broadened to be available for any program involving sales of houses in excess of 25 units per year (A 1294-1295). Finally, that document makes it clear that the only purpose in making such loans was making sales of house packages (A 1296).

In order to provide further evidence concerning plaintiff's position on the "economic power" issue, supplemental witnesses were called by plaintiff in November, 1973.

Ralph Logan, President of Southern Savings & Loan Association, and Charles Will, President of Portland Federal Savings & Loan Association, were called. Mr. Logan testified that his Association was not Federally regulated in 1959-1961 but that they were not making land acquisition and development loans, much less 100% such loans. He pointed out that 100% land acquisition and development loans were not prudent due to the risk factor (A 1711-1716).

Mr. Will's testimony was similar except that his Association was restricted to 60% land acquisition and

development loans by Federal regulation. His Association would not have made such loans if it could due to the risk factor. He knew of no one making such loans in the Louisville area during the pertinent period.

The Court found that Portland Federal was able to obtain the same interest rate, a higher service fee and the same maturity for a 60% land acquisition and development when compared to Credit Corporation's loan to plaintiff (A 1584).

We also called Dr. John Masten as an expert witness. The Court's Findings set forth the substance of Dr. Masten's testimony as follows:

> "The Court finds that Dr. Masten was highly qualified to testify in the lending and eonomic areas involved in this litigation and Dr. Masten's qualifications were certainly not questioned by counsel for the defendants. Dr. Masten's particular background in Kentucky, including the period of time involved in this lawsuit, especially qualify him to testify about lending policies and practices in the Kentucky area.
>
> Dr. Masten first pointed out that all loans are not the same and that there are risk differentials that make each loan almost separate in its own characteristics [p. 27]. Assuming that all terms and conditions are the same, Dr. Masten pointed out that the larger the percentage of a land acquisition and development loan to cost of the land acquisition and development, the higher the risk of the loan becomes to the lender [p. 28].
>
> He pointed out that a lender would want to be protected by some type of guarantee, whether it be in the context of the amount of the loan relative to

> the value of the property or a guarantee by some third party [p. 28]. In other words, normally a lender will lend a borrower money if the borrower could prove that he really doesn't need it [p. 28].
>
> It was brought out that Dr. Masten, in preparing for his testimony, had quite properly reviewed various key exhibits in this case including the Loan Agreement in question [Plaintiff's Exhibit 5], the Underwriting Agreement [Plaintiff's Exhibit 237], the Financial Statement of the defendant, United States Steel Corporation covering 1960-1961 [Plaintiff's Exhibit 31], and the 1961 and 1962 Financial Statement of the Credit Corporation [Attachments to Plaintiff's Exhibit 2].
>
> In response to a hypothetical question which included the basic pertinent facts introduced into evidence in this litigation, such as the undisputed fact that the loans for land acquisition and development from the Credit Corporation to Fortner Enterprises represented 100% of the cost of land acquisition and development thereof, and that as of the time of the first such loan, Fortner Enterprises had a deficit of approximately $16,000.00, and that no personal guarantees were required of any officer of Fortner Enterprises, Dr. Masten testified that a loan such as was made to Fortner Enterprises would not have been available from normal channels of credit. He pointed out that this was a very unique kind of loan and that it was not the kind of loan you would normally find in the housing credit market at that time [pp. 31, 32].
>
> Dr. Masten pointed out that this loan was unique in and of itself because it represented 100% of the cost of land acquisition and development particularly for the period of time in question.

Such a loan is of such a high risk nature so that a prudent lender would have been unwilling to have made a loan involving 100% risk [p. 32].

Dr. Masten pointed out that the period of time in question, namely, 1959, 1960 and 1961, was a period of economic stability and not a period of inflation and that there was a definite risk inherent in a 100% loan under such conditions of economic and price stability [pp. 32, 33]. He referred in support of his testimony that this was a period of economic stability to the wholesale price index.

One of the other unique characteristics of this loan as brought out by Dr. Masten was that the loan was guaranteed, not by an affiliate of the borrower but by an affiliate of the lender, namely: United States Steel Corporation [p. 33]. Dr. Masten went on to point out how highly unusual it is for a company connected with the lender to guarantee the loan to the lender. The normal situation is for a company or person connected with or associated with the borrower to guarantee the loan to the lender [pp. 35, 36].

Dr. Masten also pointed out that the tie-in provisions of the loan themselves made the loan unique and at the same time required the borrower to buy houses from the Homes Division as a condition of getting this unique type of loan [p. 33].

Dr. Masten pointed out that the rate of interest charged on these loans was 6% with a ½% fee. He pointed out that the prime rate at that time when all cost factors were considered would have run 5 to 5½% and that the loan to Fortner Enterprises was above the prime rate but still low considering the risk involved in making the loan and

that it would have been virtually impossible for Fortner Enterprises to have obtained a loan at the level of interest and fee from any other source [pp. 34, 35].

Dr. Masten pointed out that which had been previously established in the record, which was, that banks generally were prohibited by law from making 100% land acquisition and development loans as well as Federally insured savings and loan associations and that other conventional lenders would not have made such loans at the time in question since they were not prudent loans due to the risk involved [p. 37].

It was Dr. Masten's Opinion that the Credit Corporation had economic power by granting terms to the borrower that were so distinctly unique that it was almost inconceivable that the funds could have been acquired from any other source [p. 38].

Dr. Masten pointed out that there are really segments of the credit market and it is not one over-all market. He pointed out that in his opinion 100% land acquisition and development loans of the nature and terms granted to the plaintiff were a segment of the credit market [p. 39], and that if you only have one lender making such loans within that segment of the market, then that lender has economic power within that segment [p. 39].

Finally, Dr. Masten testified that in his opinion, based on his analysis of the situation, including the nature of the loans made by the Credit Corporation and the Credit Corporation's relationship with United States Steel Corporation that the Credit Corporation had definite leverage in

the segment of the credit market related to land acquisition and development loans as a lender because of the uniqueness of the terms of the loans made and that this leverage was exercised [pp. 47, 48]." (A 1593-1597)

The undisputed evidence was that the U. S. Steel package was priced $455.43 more than the comparable components at the same point in a conventional home (A 637), and $443.26 more than the Empire pre-fabricated package in a comparable condition (A 640).

Suffice it to say that after Fortner Enterprises entered into the building program and began making sales of the U. S. Steel packages it encountered problems of defective materials and design in the packages and delays which resulted in the subdivision obtaining a bad reputation and lack of sales with the further result of loss of income and profits to the plaintiff. All of this evidence is in the record and constituted the evidence of causation which the jury considered.

After all other solutions were tried to no avail, plaintiff sought to be relieved of the tie-in requirement at a meeting held between representatives of plaintiff, the Credit Corporation and United States Steel Corporation on June 5, 1962, and this request for relief was adamantly refused by the Credit Corporation (A 260-263, 1261-1262). Although plaintiff was current in its accounts with the defendants at that time (A 1300-1301), the Credit Corporation had an audit of plaintiff made and decided to demand payment of all obligations and institute legal action to collect (A 1248-1250), and as a result such demand for payment was made on July 12, 1962 (A 75-76), and one week later this antitrust action was instituted seeking to enjoin their foreclosure action and for damages (A 38-76).

SUMMARY OF ARGUMENT

Petitioners attempt to argue that Fortner failed to establish a prima facie case even though this Court in 1969, the Sixth Circuit in 1971, the District Court in 1973 and the Sixth Circuit again in 1975 had all held that Fortner had made a prima facie case of violation of Section 1 of the Sherman Act.

Substantial evidence was presented on behalf of Fortner to establish the requisite economic power. Numerous similar tie-in arrangements required by Petitioners were proven. The loans offered and made to Fortner were unique and unusual which was evidence itself of economic power. Such loans were not available from other sources due to legal and economic barriers. The guarantees of the loans of Credit Corporation by United States Steel conferred a distinct cost advantage on the Credit Corporation along with United States Steel's deliberate use of its vast wealth and credit standing to allow Credit Corporation to undertake projects other lenders could not economically or legally risk.

Fortner's expert economic evidence through the testimony of Dr. John Masten and others at a minimum created fact issues which the District Court acting as fact finder by agreement of the parties found in Fortner's favor, and which the Sixth Circuit affirmed.

The Supreme Court ordinarily does not decide factual questions and there is no reason for it to do so in this case, particularly when the Supreme Court has already held that there were fact issues to be decided at the trial level.

There also was adequate evidence to justify the District Court as fact finder in finding a conspiracy to monopolize.

The District Court found a conspiracy to increase sales of house packages including specifically the establishment of the loan programs to increase United States Steel's share of the prefabricated house market. Overt acts in furtherance of the conspiracy were established along with the necessary intent. In any event, the Supreme Court need never reach this issue since the per se violation of Section 1 of the Sherman Act should be affirmed.

There is no compelling reason for the Supreme Court to take back its 1969 decision in this case. Proper standards have been adopted and followed below and should not be disturbed. The Judgment entered below should be affirmed.

ARGUMENT

I.

FORTNER PROVED A PRIMA FACIE VIOLATION OF THE SHERMAN ACT

A. This Court Held That Economic Power Can Be Established By Many Elements of Proof.

We would be remiss if we did not comment at the outset that we were astounded that the Writ of Certiorari was granted at this time in this case. Surely the Supreme Court is not going to act as a fact finder.

If consideration is being given by the newly constituted Court to changing the Fortner doctrine, why now? After we have gone through two trials and two appeals to the Sixth Circuit Court of Appeals, is the campaign of persistent appeals by Petitioners finally to be successful? After almost seven years of work in reliance on this Court's 1969 Opinion as the law of the case, it is hardly equitable to consider at this time taking Fortner's Judgment from it.

We know of no reason to consider changing the Fortner doctrine, but a clarification of any ambiguity would not require a reversal of the existing Judgment. We will demonstrate in this Brief that a reversal is not warranted.

This Court in its 1969 opinion in this case held that summary judgment dismissing Plaintiff's Complaint was not proper and states in the opinion, "Under these circumstances the pleadings and affidavits sufficiently disclose the possibility of market power over borrowers

in the credit market to entitle petitioner to go to trial on this issue." (*Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 507). In the next paragraph of the opinion, the Court goes on to state, "We therefore conclude that the showing made by petitioner was sufficient on the market power issue."

In this present appeal, petitioners have a tendency to take bits and pieces of this Court's 1969 opinion and quote them out of context to suit their own purposes. Respondent, Fortner Enterprises, Inc., respectfully submits that this tactic on the part of petitioners should be rejected.

Mr. Justice Black's majority opinion in a very orderly fashion first establishes that there undisputedly was in fact a tie-in agreement appearing in the Loan Agreement and that a not insubstantial amount of interstate commerce in the tied product, prefabricated house packages, was affected. Thus, for all practical purposes two of the three elements necessary to establish an illegal tie-in agreement violative of Section 1 of the Sherman Act were present in the record before this Court in 1969.

Mr. Justice Black then discussed in the opinion the third element, the so-called "sufficient economic power" issue. He points out that this does not mean that a defendant would have to have a monopoly or even a dominant position in the market for the tying product or element. He points out that the requisite economic power can exist as to only some of the buyers in the market.

Based on the record before him, Justice Black then enumerated a number of standards or elements of evidence which possibly alone or in combination among themselves would establish the requisite "sufficient economic power." Those included (1) the ability to raise prices, (2) the ability to impose burdensome terms such as a tie-in on any appreciable number of buyers in the market, (3) the ability to charge a higher price for the tied product, (4) unique and unusually advantageous terms in the tying element, (5) Credit Corporation's unique economic ability to provide 100% financing at cheap rates, (6) economic barriers as to other lenders due to risk factor, (7) cost advantage in the tying element, and (8) legal barriers as to other lenders.

Petitioners seek to argue that the only way Fortner Enterprises could prove the requisite economic power would be for Fortner Enterprises to establish that petitioners had an unique cost advantage in the tying element, the loan, or that legal barriers prevented other lenders from making such loans. We respectfully submit that there simply is no way that you can read the Supreme Court's 1969 opinion in this case to limit the proof to those narrow elements. In two separate opinions in 1971 and 1975, the Sixth Circuit Court of Appeals has rejected identical arguments of that nature made by counsel for petitioners.

At page 21 of Petitioners' Brief, we have a typical example of taking a reference in Justice Black's opinion out of context. Contrary to the bald statement made, this Court in its 1969 opinion did not recognize that the tying element was not unique or distinctive and

that said tying element was fungible. While dollar bills themselves may be interchangeable and fungible as such, loans on particular terms, in particular amounts, at particular interest rates, covering particular periods of time, with or without particular collateral, are obviously not the same and are equally obviously not fungible.

Petitioners conveniently ignore the wealth of evidence presented by Fortner Enterprises, Inc. at the trial of this case which covered a 30 day period in 1970 and the additional evidence presented in 1974. In particular, we call to the Court's attention the testimony of Fortner Enterprises' expert, Doctor John Masten whose qualifications and testimony were not challenged by petitioners and whose testimony was relied upon by the District Court as fact finder in making his findings in this action. Doctor Masten did establish that loans are different and unique and demonstrated how one loan could be more advantageous than another and therefore more desirable. He further demonstrated that the loans made to respondent, Fortner Enterprises, by petitioners at the time and under the circumstances in question were not available due to economic and legal barriers as specifically enunciated in Justice Black's opinion.

The essence of this case at the present time which petitioners seek to ignore is that the Trial Court as fact finder, by agreement of both sides, made findings of fact and conclusions of law based upon the evidence before the Court, those findings are supported by that evidence and are not clearly erroneous. This Court in

1969 held that there were fact issues for a trial and determination by a fact finder, jury or judge as fact finder, on the economic power issue. The District Court made the appropriate findings and the Sixth Circuit has affirmed.

In 1969 this Court found fact issues for trial concerning economic power. The Sixth Circuit found the same in 1971. The District Court made his findings as fact finder in 1973 and the Sixth Circuit found those findings supported by evidence and affirmed.

The Supreme Court has held in reference to itself in *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U. S. 271, 275 (1949):

> "A Court of law, such as this Court, is, rather than a court for correction of errors of fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

In *Berenyi* v. *Immigration Service*, 385 U. S. 630, at p. 661 (1967), this Court said:

> "The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues."

The District Court made some 46 separate enumerated findings of fact with findings 23 through 46 being related specifically to the economic power aspect of the case. The Court found that the Credit Corporation specifically embarked upon a program to make special

types of loans not available from normal or conventional sources (finding 24). The Court in findings 27 through 32 describes the testimony of a number of witnesses called by Fortner Enterprises which established that due to economic or legal barriers loans of the nature made to Fortner Enterprises were not available during the period of time in question.

The District Court further found that under certain documents obtained from the files of United States Steel Corporation and the Credit Corporation and from the testimony of certain witnesses from those companies and from the fact that United States Steel Corporation itself had guaranteed the Fortner Enterprises' loans and others in the special financing category to the Credit Corporation that the Credit Corporation was not concerned with risk but that its loans would sell houses, obviously contrary to the economic realities existent at the time with other lenders or potential lenders (finding 35).

The District Court found that United States Steel Corporation had deliberately chosen to allow the Credit Corporation to use its parent's credit standing with banks to obtain the bulk of the funds which Credit Corporation in turn lent to its customers and that those funds were obtained at the prime rate. On the basis of the evidence in the record, the Court found that United States Steel Corporation could have used its own funds which were readily available to finance the Credit Corporation directly, which funds would have cost the Credit Corporation nothing. Credit Corporation quite clearly would have been at a distinct cost

advantage if United States Steel Corporation had funded Credit Corporation entirely at a no interest basis which could easily have been done. What we have instead is a deliberate plan on the part of United States Steel Corporation and the Credit Corporation to use their position in the marketplace to obtain sales of prefabricated house packages through the making of high risk type loans not available from other sources.

The fact finder also found that the prefabricated house package sold to Fortner Enterprises was priced $455 more than the comparable components at the same point in a conventional home. Contrary to the argument made by petitioners, petitioners counsel did make an abortive attempt during the course of the trial to establish that a non-representative U. S. Steel Homes Division invoice for a house package was being used as a basis of comparison but this was conclusively established to be an attempt to mislead on the part of petitioners to the extent that the Trial Court finally admonished the jury in that regard (A 690-691).

We would call to the Court's attention that the expert, Dr. John Masten, called to testify on behalf of Fortner Enterprises, Inc., put all of the economic power evidence into full focus and context. Doctor Masten's testimony was adopted by the District Court as fact finder in finding number 44. In this regard we would call to the Court's attention that there are additional elements of proof in the record which were not in the record when this case was before this Court in 1969. Doctor Masten's testimony cannot be ignored, particularly when it was adopted by the District Court as fact

finder as part of the Court's actual findings. Neither Doctor Masten's qualifications nor his testimony were actually challenged by petitioners. Doctor Masten, as pointed out by the fact finder, actually establishes that petitioners conferred voluntarily upon themselves a degree of economic power by deliberately putting themselves into a position to take economic risks which others could not take at the time really regardless of whether or not they had a cost advantage. This may be an unusual situation, but it is actually that which did occur and that which enabled the Crdeit Corporation to make numerous loans accounting for millions of dollars worth of sales of prefabricated house packages.

Justice Black in his majority opinion in this case made it quite clear that he was not foreclosing any evidence which Fortner Enterprises might be able to present to establish the requisite economic power. Fortner Enterprises was able to establish that most if not all of the various elements of proof mentioned in Justice Black's opinion were present. We established the ability to raise price and to impose the tie-in on a substantial number of customers. We established undisputedly their ability to charge a higher price for the tied product. We certainly established the unique and unusually advantageous terms in the tying element, the loan. We established the Credit Corporation's unique economic ability to provide a 100% land acquisition and development loan at cheap rates as a part of the deliberate scheme of the petitioners. We established the economic barriers due to risk factor as well as legal barriers to

many lenders and actually established what amounted to a cost advantage. All of these factors put together gave us a sufficient evidentiary background from which the District Court as fact finder in his Findings of Fact and Conclusions of Law concluded that the requisite "sufficient economic power" existed.

But there was additional evidence as found by the District Court from Doctor John Masten's testimony which Justice Black did not contemplate in the 1969 opinion. The economic theory applicable to this case is certainly not the same as the applicable legal principle. The applicable economic theory in this case should appear as a part of the evidence of the case and not as a part of abstract argument on the part of counsel. Doctor Masten in essence in his testimony points out that a Rolls Royce is not a Chevrolet. In other words, Doctor Masten points out and the District Court as fact finder found that there actually are different segments of the loan or credit market depending upon the nature of the terms of the loan. Doctor Masten testified that an 80% land acquisition and development loan is not the same as a 100% land acquisition and development loan. If at a given time only one lender is making 100% land acquisition and development loan, that lender has control of or actually monopoly power over that segment of the market. Doctor Masten pointed out that in this case in the time period of the Fortner loans, the Credit Corporation was the only lender making such loans and therefore had the economic power without more within that segment of the lending market.

Contrary to the contentions of petitioners, there was absolute evidence of the requisite economic power and the fact finder's findings in that regard were not clearly erroneous.

B. Legal and Economic Barriers Did Prevent Other Lenders From Making Loans On Equally Favorable Terms.

1. Many Lenders Were Legally Barred From Making 100% Land Acquisition and Development Loans.

This Court in 1969 took judicial notice of the fact that many lenders were legally barred from making 100% land acquisition and development loans. As indicated in the District Court's Findings of Fact, banks and federally insured savings and loan associations definitely were prohibited by law or regulation from making any such loans. Mr. Charles Will, for example, President of a federally insured savings and loan association in Louisville, Kentucky, testified that his organization was restricted to making loans which amounted to 60% or less of the cost of land acquisition and development during the period of time in question.

Certainly the legal prohibitions did not apply to all potential lenders but it is equally clear that they did apply to a very substantial segment of the potential lenders.

2. Petitioners Did Have a Cost Advantage at Least in the Sense of Their Deliberate Action to Achieve a Particular Goal.

As we have previously pointed out, the Credit Corporation at the instigation of United States Steel Corporation itself deliberately embarked upon a program of special financing designed to obtain business for the Homes Division. It was not concerned with making profit, although it did in fact make a profit. It was not concerned with paying dividends to its parent, United States Steel Corporation. As previously noted, and as the Trial Court as fact finder found, it could have been financed entirely by cash from United States Steel Corporation's vast wealth, and it clearly would have had a cost advantage. Instead, they *elected* to use United States Steel Corporation's credit standing to borrow money from banks. As pointed out by Doctor Masten, the exceedingly high risk loans which the Credit Corporation was making under the special financing program generally would require guaranties or additional securities above and beyond the property and improvements in question. The additional security or guaranties would in a conventional borrowing situation come from the officers or owners of the borrowing corporation in the form of some specific type of pledge of additional collateral or in the form of personal guaranty agreements signed by the officers or owners of the borrowing corporation. In the present case, this is not what occurred. Instead, the guaranty came from the Homes Division of United States Steel Corporation and personal guaranties or collateral were not required

of the officers or stockholders of Fortner Enterprises, Inc. We thus have the conspirator being benefited by the tie-in arrangement guaranteeing the obligation. This was the deliberate, calculated type of power play which only a company like United States Steel Corporation could afford to embark upon.

We simply cannot understand what difference it makes whether a company has some alleged cost advantage in fact or whether that company chooses to deliberately exercise economic power under circumstances as if it did have a cost advantage when that economic power is actually the result of economic risks undertaken.

At the given time in question in this litigation, the Credit Corporation had a cost advantage not available to other lenders through the guaranties of United States Steel Corporation itself of the loans under the special financing program. All risk to the Credit Corporation was eliminated. No comparable cost advantage could possibly have been available to any other lender at that time. Credit Corporation was guaranteed a complete return of its money including the interest rate charged.

Therefore, to the extent that petitioners argue and that the Sixth Circuit concluded that Fortner Enterprises, Inc. did not have evidence of cost advantage, we disagree. It was not cost advantage in the traditional sense but it was clearly an advantage conferred upon the Credit Corporation comparable to an actual cost advantage.

Counsel for petitioners argue absence of evidence that other lenders could not have made 100% land

acquisition and development loans profitably at the time in question. However, numerous witnesses offered by Fortner Enterprises, Inc. testified that they would not make such loans due to the risk involved, obviously meaning that they did not feel that they could profitably make such loans. Economically they would not and could not make such loans.

They also testified that such loans were not available from other sources at that time for the same reasons, particularly Dr. Masten.

C. In Finding That Petitioners Had Economic Power Over the Type Loans Made to Fortner, the Courts Below Properly Applied Applicable Legal Standards.

1. The Courts Below Found Many Elements of Proof Which Established the Requisite Economic Power.

As previously indicated, this Court's 1969 opinion discussed numerous areas of proof which would tend to establish the requisite economic power. This was made abundantly clear in the 1971 opinion of the Sixth Circuit which discussed some of the evidence adduced during the rather extended trial of this case in 1970 and which held that there were various inferences which could be drawn from the proof as submitted during the 1970 trial which raised questions of fact for a fact finder and which prohibited the directed verdict in favor of Fortner Enterprises, Inc. on the liability issues. In the footnote at the end of the 1971 opinion, the Sixth Circuit pointed out that it had in no way undertaken in its opinion to review all of the items of evidence bearing on the question of economic power.

Judge Miller points out that the entire range of evidence including the significance of United States Steel Corporation's guaranty of the loans under the special financing program as evidence of leverage were to be submitted to the jury, i.e. fact finder under subsequent developments, for overall review.

In 1975, the Sixth Circuit was confronted with another appeal which basically was arguing the sufficiency of the District Court's findings. There was additional evidence in the record at that time and there was an enumeration by the District Court as fact finder of the evidence which the fact finder found to be significant in making an overall determination of economic power on the part of the Petitioners.

The Sixth Circuit in 1975 quite properly determined that Fortner Enterprises, Inc. was not relying upon uniqueness alone but upon a series of evidentiary facts and circumstances indicative of economic power. Again the Sixth Circuit did not purport to discuss all of the evidence relied upon by the District Court as fact finder in arriving at the economic power determination. The District Court's overall findings in that regard cover findings 23 through 46 in the findings of fact as well as areas under the Conclusions of Law section of the Court's overall findings. Petitioners would conveniently seek to limit the Court's basis for finding economic power but that simply is not the case.

Typical of the approach taken by Petitioners in this case over the years, they use the divide and conquer approach. If they can divide the basis for the claim into segments and attempt to conquer each segment

separately, they then claim to have defeated the whole. We respectfully submit that the Courts below were properly concerned with the whole or entire issue of economic power and that the evidence as a whole in this regard was sufficient.

2. The Uniquely and Unusually Advantageous Terms of The Loans to Fortner Were Evidence of Economic Power.

Justice Black in the majority opinion held, "We do mean, however, that uniquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitors." "Reflect" in the context used by Justice Black in the preceding quotation is defined in any standard dictionary as meaning "manifest" or "show." This is simply another way of stating that such terms can be *evidence* of economic power.

Under the holding of *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962), uniqueness of the tying product or its desirability to at least some consumers was sufficient to meet the economic power test. In the present case the uniqueness and desirability is undisputed, so it had to be, as Justice Black held, at least evidence of economic power.

Petitioners seek to equate uniquely and unusually advantageous terms with cheaper terms. We submit that in the context of this case this is not correct again as demonstrated by the witnesses produced by Fortner Enterprises, Inc. and not by the unsupported indulgence of fantasy on the part of counsel for Petitioners. The unusually unique and advantageous terms

in question here were such for a number of reasons. First and foremost, they involved Fortner Enterprises' entire cost of land acquisition and development plus Fortner Enterprises' entire cost of building the house up to the point of the closing. The time period of two years was significant. The interest rate at the same level as other companies at the time were making for 60% loans was favorable. The fact that the Credit Corporation did not require personal guaranties of Mr. Fortner or the other officers or stockholders of the company was also distinctly favorable.

This was part of the evidence which when viewed with the other evidence as a whole was sufficient in the mind of the District Court to establish the requisite economic power.

3. The Higher Price For the Tied Product, the House Package, Was Evidence of Economic Power.

Justice Black again in this Court's 1969 majority opinion held that the $400 price differential ". . . with respect to the tied product (prefabricated houses) in itself may suggest that" Petitioners "had some special economic power in the credit market." Again, elementary English usage and any standard dictionary would demonstrate that Justice Black's use of the term "may suggest" is used in the context of this case as "may indicate" or "may create an inference of." Again, this is simply another way of saying that a higher price for the tied product may be a part of the overall evidence for a fact finder to consider in determining economic power on the part of Petitioners in this case.

Petitioners are now seeking to argue facts although giving lip service in the earlier part of their brief to a basic proposition that the facts are undisputed. Obviously the facts were disputed and the inferences to be drawn from those facts were disputed under the Sixth Circuit's 1971 decision. In this instance the fact finder in finding 43 specifically found that the United States Steel house package was priced $455 more than the comparable components at the same point in a conventional home.

Mr. Fortner has testified repeatedly that he would not have purchased the prefabricated house packages from the Homes Division and therefore have agreed to the tie-in provision in question in this case absent the loans offered. Every effort was made to sell the product in spite of its defective character until the company was finally run into effective insolvency. Certainly the Homes Division people sold Mr. Fortner a bill of goods concerning the house package, but it is still the fact finder's finding (finding of fact 13) that Fortner was only willing to accept the tie-in because of the unique character of the loans offered.

It is hardly Petitioners' place in an appeal of this nature to question the quality of the evidence presented. There was evidence that economic coercion did exist and the fact finder so found. The only purpose of the economic coercion argument made in the cases cited by counsel for Petitioners is really to establish that the

tie-in itself existed between two distinct products.[2] There is a substantial distinction where the tie-in is admitted and is in writing in the form of the loan agreement as set forth in this case. To require coercion in tie-in cases as an additional element would be an invocation of the in pari delicto doctrine which this Court in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134 (1968), has specifically rejected in antitrust cases.

Petitioners did attempt to attack the testimony of the witness, Herman Miles, concerning his comparison of the U. S. Steel prefabricated house package and a conventional home at comparable development by attempting to make a series of misleading comparisons involving invoices which contained extra items for which extra charges were made which did not appear in the conventional invoice used, but upon redirect we were able to bring out conclusively this attempt to mislead as was pointed out by the District Court (A 690).

Petitioners also argue that other evidence of a comparison of their prefabricated house package with the prefabricated house packages of their competitors was not introduced. This is again a comment on the quality or quantity of the evidence in the case. If Petitioners felt that this would aid their defense, they certainly had the resources and ability to obtain evidence of that

[2]In *American Mfrs. Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 446 F. 2d 1131 (2d Cir. 1971) cert. denied 404 U. S. 1063 (1973), and *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F. 2d 658 (2d Cir., 1974), the coercion argument was an integral part of the proof necessary to establish the alleged tie-in arrangement attached.

nature. We felt on behalf of Fortner Enterprises that our evidence was adequate in this regard and this was affirmed by the District Court as fact finder and by the Sixth Circuit.

This Court held that a higher price for the tied product was evidence of economic power, that evidence was produced and was part of the overall evidence considered by the fact finder in making the determination of sufficient economic power which was affirmed by the Sixth Circuit.

4. Acceptance of the Tie-in by Many Customers is Evidence of Economic Power.

Justice Black in this Court's 1969 decision stated as straightforwardly as possible, "Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market."

Again, Petitioners ignore the majority opinion in this case. They make the bald statement that customer acceptance of a tie-in as an element of evidence is contrary to economic analysis and legal standard. We know of nothing in the record upon which they could possibly rely from the standpoint of economic analysis by any witness which even remotely so argues. We know of no particular expertise in the economic field which counsel for Petitioners possesses which qualifies him or them to set forth economic theories as gospel.

We do know that this Court itself has held that this is at least an element to be considered or concerned with

in a tie-in case as set forth in the quotation above. The Fourth Circuit in *Advance Business Systems and Supplies Co.* v. *SCM Corporation,* 415 F. 2d 55 (4th Cir., 1969), cert. denied, 397 U. S. 920 (1970), in applying this Court's 1969 decision in this case relied upon the fact that numerous customers had accepted the tie-in provision in question as conclusive evidence of the requisite economic power. At page 69 of the Advance Business Systems opinion, *supra,* the Fourth Circuit stated, "Acquiescence in the burdensome terms by an appreciable number of customers gives rise to an inference that SCM had 'some power over some buyers' in the market. Consequently, the tie-in arrangement is per se illegal under Section 1 of the Sherman Act." That opinion also points out that only 25% of the SCM customers in question had entered into the service maintenance agreement containing the tie-in provision.

Northern Pacific Ry. v. *United States,* 356 U. S. 1, 8 (1958), is an obvious illustration of the fact that evidence of acceptance of the tie-in by substantial number of customers will be evidence of the requisite economic power. As a matter of fact, that opinion affirms the summary judgment for the United States finding a per se violation as a matter of law. See also *International Salt Co.* v. *United States,* 332 U. S. 392.

The only case relied upon by Petitioners is that of *Anderson* v. *Home Style Stores, Inc.,* 381 F. Supp. 402 (E.D. Pa., 1974) aff'ed w/o opinion, 511 F. 2d 1392 (3rd Cir. 1975), a District Court opinion affirmed without opinion by the Third Circuit, which gave a summary judgment to the defendant apparently where the

District Court felt that plaintiff had confined itself to a claim of economic power based upon unavailability elsewhere of the credit necessary to go into business. In that context, apparently the District Court did not feel that evidence of an appreciable number of buyers would be evidence of economic power. In the *Anderson* case, *supra,* plaintiffs failed to prove legal and/or economic barriers to other lenders making the type loans in question in that case. The District Court simply felt that their proof did not rise to the level that would require a trial and apparently the Third Circuit agreed.

In the present case, this Court and the Sixth Circuit on two occasions have held that Fortner Enterprises' proof did rise to the level requiring a trial, the trials have been held and the facts have been found.

The Sixth Circuit in our Fortner cases has refused to go as far as the Fourth Circuit did in the *Advance Business Systems* case, *supra,* and hold that evidence of acceptance of a tie-in agreement by an appreciable number of buyers in and of itself is sufficient evidence of economic power. This Court denied certiorari in that case. This Court could very well affirm the decision in this case on the basis of Advance Business Systems alone. Certainly the lesson is clear that such evidence is admissible and probative of economic power, particularly when taken in conjunction with the other evidence of economic power presented in this case.

5. A Fact Finder May Weigh All of the Evidence and Make a Finding Accepting Some Evidence and Rejecting or Giving Little Weight to Other Evidence.

Counsel for Petitioners appear to give the impression that they are totally unfamiliar with trial practice and procedure. Substantial evidence as we have demonstrated above was presented justifying a finding of economic and legal barriers to others at the time in question to making the types of loans made to Fortner Enterprises, Inc.

Petitioners argued that some limited evidence introduced, primarily in the testimony of Mr. Edwin Horn (A. 821-847), indicating that in subsequent years a few savings and loan associations had made some 100% land acquisition and development loans under different circumstances than those presented in the Fortner case was evidence that such loans could have been made during the period of time in question in this case. The Sixth Circuit in its 1971 opinion recognized that this was evidence which created an inference which a fact finder could, if they or he so chose, take into consideration as a part of the overall proof. The whole purpose of a jury or a judge acting as fact finder is to allow the fact finder to sift the evidence and accept that which is persuasive and reject that which is not persuasive.

Actually Mr. Horn testified that loans of any nature to corporations with a deficit would require personal guarantees (A. 822). The limited loans his company made in subsequent years were not the same as Credit Corporation offered Fortner. The evidentiary substance and weight of this proof was for the fact finder to weigh.

The same general statement made by Mr. Horn in his testimony at the trial also appeared in Mr. Horn's Affidavit which was part of the record at the time this case was before the Supreme Court in 1969. The majority opinion made no direct reference to that point whatsoever. Certainly the majority opinion did not *require* that that be taken as a controlling factor.

It was obvious to us as a result of our long exposure to the District Court's thinking concerning this case after it came back from the Supreme Court that the District Court gave no great weight to the evidence of that which occurred at a future date. The District Court had always placed significance in his comments before counsel on the positive testimony of the witnesses indicating that such loans were not available at the time they were made to Fortner Enterprises from others due to the legal and economic barriers established in the evidence. The fact finder was free to give little weight to or ignore that evidence and he obviously chose to do so.

Petitioners make the bald statement at page 42 of their Brief that if they had had economic power in the credit market they would hardly have limited the Credit Corporation's financing activities to supporting the Homes Division's sales of prefabricated house packages. There is no evidence one way or the other in the record as to the extent that United States Steel Corporation has used its vast wealth and financial resources and financial leverage in other areas of its business.

Just because they didn't use the Credit Corporation to exert that leverage doesn't mean that they still have not used it.

We are entitled to equally speculate that they have so used such leverage in other areas of its business as they are to claim without evidentiary support that they have not done so insofar as the Credit Corporation is concerned. It of course should be noted that they carefully limit themselves to reference to the Credit Corporation in that regard. We do know that United States Steel Corporation has exerted its power in that regard in at least one instance as established in the Sixth Circuit in *United States Steel Corp.* v. *Federal Trade Commission,* 426 F. 2d 592, 604 (Sixth Circuit, 1970). In that case, the Sixth Circuit recognized U. S. Steel's potential economic power in the credit area (page 604) and also in its assistance in financing a customer above and beyond the funds needed to purchase cement from United States Steel on condition that said customer buy all of its cement from United States Steel (page 610). Actually, it has been our impression that the reason United States Steel Corporation has persisted in its many appeals of this particular case has been an attempt to safeguard itself from attack in other areas of its business of much greater dollar significance to Petitioners than this case.

Obviously the fact finder could not consider arguments or evidence not properly before him. The fact finder's findings and conclusions were supported by adequate evidence, were not clearly erroneous and were affirmed by the Sixth Circuit.

D. The Courts Below Quite Properly Found That the Loans Made to Fortner Amounted to 100% of the Cost of Land Acquisition and Development.

Petitioners again are making evidentiary arguments according to their view of the evidence. Their view of the evidence was not accepted by the fact finder nor the Sixth Circuit.

The fact finder in finding 26 actually indicated that ". . . . the evidence was undisputed that those loans made by Credit Corporation to Fortner Enterprises, Inc. amounted to 100% of Fortner Enterprises' cost to acquire the land in question and to develop it." He also found that the evidence established that ". . . the construction portion of the loans from Credit Corporation to Fortner Enterprises amounted to all of the funds which Fortner Enterprises required under normal circumstances to build houses on the lots." At no time has Fortner Enterprises ever claimed that it was able to borrow its profit from the Credit Corporation. That is totally irrelevant as found by the Courts below.

The undeveloped land and the developed lots which became the subdivision in question were owned by a separate corporation which was in turn owned by Mr. Fortner and another gentleman on a 50-50 basis. The funds from the land acquisition portion of the loan were paid over in their entirety for acquisition of the developed and undeveloped lots.

Petitioners' own contemporaneous document described the loans to Fortner Enterprises, Inc. as being 100% (Plaintiff's Exhibit 69, A 1244).

Again, without evidentiary foundation, Petitioners argue that percentages of loans are supposed to be arrived at by taking a percentage of "value" of the property as opposed to cost. In the first place, under the evidence in this case, this simply isn't correct. For example, Mr. Charles Will, Sr., President of Portland Federal Savings and Loan Association and a duly licensed and practicing attorney in Kentucky (A 1723), testified that the standards in effect at the time in question limited loans to the applicable percentage which in 1960 was 60% of the value of the raw land acquired and of the cost of development (A 1724-1725). On cross-examination by counsel for Petitions, he specifically pointed out that the standard was actually the lesser of cost of acquisition or value (A 1730).

We would even call to the Court's attention that Petitioners' own contemporaneous document indicated that the second loan amounted to 130% of cost (A 1242).

Petitioners have confused some discussions which took place in the early portion of the negotiations with the Credit Corporation and the actual facts developed at the trial. It is and always has been clear that of the initial loan proceeds the entire sum designated as land acquisition funds actually were paid for all of the undeveloped and developed property which constituted the original project in question in this case.

The witnesses who testified in this case fully understood the use of the term cost, apparently better than counsel for Petitioners, and the fact finder certainly fully understood it.

In fact, the Sixth Circuit specifically contradicts Petitioners' argument in this regard when it points out "the testimony of Plaintiff's witnesses does not suggest that any of them misunderstood the context in which the 100% figure was used in this case."

This is really a new approach taken by Petitioners at the appellate level, since Petitioners' own counsel on cross-examination of Mr. Fortner went to great lengths to establish that the land acquisition portion of the loan in the sum of $170,500 was paid to the company which then owned the entire 187 lots (A 324-325). Counsel for Petitioners even brought out from Mr. Fortner that he did not intend to and did not in fact put any money into the transaction (A 326-327). Actually, if you want to argue inferences, the clear inference to be drawn from the evidence presented concerning the land acquisition portion of the loan was that the sum in question probably exceeded so-called "value" since Mr. Fortner's partner was being bought out of the transaction as a part of the sale of the land in question to Fortner Enterprises, Inc. That man certainly wasn't going to take less than value for his interest in that property.

Again Petitioners have quoted this Court's 1969 opinion out of context when they refer to the desirability to obtain collateral greater in value than the loan it secures (page 505). That reference, of course, has to do with the fact that other lenders would be economically barred from making 100% land acquisition and development loans due to the risk factor involved.

The facts really were quite simple. First, in this case cost did reflect value as expressed by the witnesses and as understood by the fact finder. Secondly, the applicable standard used by lending institutions in the area at the time was a percentage of cost or value, whichever was lower, if the two figures were not the same. The witnesses clearly understood the use of cost in context in this situation and testified that 100% land acquisition and development loans were unique and not available elsewhere at the time in question. The fact finder so found and the Sixth Circuit quite properly pointed out that this finding was supported by evidence and was not clearly erroneous.

II.

FORTNER ESTABLISHED A PRIMA FACIE CASE OF CONSPIRACY TO MONOPOLIZE

In its 1971 opinion, the Sixth Circuit (452 F. 2d 1095, at 1103) held that it was inappropriate to direct a verdict for either party, ". . . on the liability issues under Secs. 1 and 2 of the Sherman Act." Most of the evidence relied upon concerning the conspiracy to monopolize aspect of the case was introduced during the 1970 trial and was before the Sixth Circuit in 1971. That same evidence was before the District Court acting as fact finder subsequently and before the Sixth Circuit in 1975.

The District Court in finding 7 of the Conclusions of Law portion of his Findings of Fact and Conclusions of Law held concerning the conspiracy to monopolize as follows:

"7. Since this Court has found a per se violation of Section 1 of the Sherman Act by the defendants pertaining to the illegal tie-in agreement, as described above, it is actually not necessary for this Court to decide whether the plaintiff has established a conspiracy to monopolize violative of Section 2 of the Sherman Act. However, since there may be an appeal of this action, the Court in the alternative does find that all of the elements of a conspiracy to monopolize do exist in this record. First, the Court finds that the defendants did combine or conspire to increase sales of prefabricated house packages by United States Steel Corporation by the making of loans to numerous builders containing the tie-in provision. The making of the loans containing the tie-in provision were overt acts in and of themselves in furtherance of the combination or conspiracy. In the context of this particular suit, the Court also finds that the defendants combined or conspired to threaten to enforce or enforce the tie-in provisions of the loan agreement by threatening foreclosure on Fortner Enterprises' property and taking certain steps to commence the foreclosure procedure. The Court finds that the millions of dollars of loans made under the special financing program affecting millions of dollars of sales of prefabricated house packages clearly affected a substantial amount of interstate commerce in both the loans themselves and the prefabricated house packages. Finally, the Court finds that the sole purpose of the loan programs of the Credit Corporation was specifically and deliberately to increase the share of the market of United States Steel Corporation in prefabricated house packages and that the implementation

> of the program constitutes the necessary evidence of intent to monopolize required. Thus, the evidence described in the Findings of Fact set forth above establishes an illegal conspiracy to monopolize in violation of Section 2 of the Sherman Act." (A 1603-4).

Since the Sixth Circuit was affirming the judgment on the basis of the per se violation of Section 1 of the Sherman Act, it simply did not feel compelled to get into the conspiracy to monopolize violation of Section 2 (A 1770).

Petitioners take issue with the finding of violation of Section 2 of the Sherman Act as a conspiracy to monopolize. We would emphasize that the finding is one of *conspiracy to monopolize,* not attempt to monopolize. *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 225, holds:

> "But the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint. Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of commerce affected . . . and Section 2 of the Act makes it unlawful to conspire to monopolize 'any part' of interstate commerce, without specifying how large a part must be affected. Hence it is enough if some appreciable part of interstate commerce is the subject of a monopoly . . .
>
> "Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States."

This decision of this Court makes it clear that the rule of reason including evidence concerning share of the market is not applicable to a conspiracy to monopolize.

Under *United States* v. *Consolidated Laundries Corp.,* 291 F. 2d 563, 572-573 (2nd Cir., 1961), intent is the main ingredient in a conspiracy to monopolize case, and neither dangerous probability of achieving monopoly nor relevant market are required to be proven.

A conspiracy to monopolize can occur without the power to carry out the object of the conspiracy according to *American Tobacco Co.* v. *United States,* 328 U. S. 781, 789.

United States v. *Yellow Cab Co., supra,* holds that the basic elements of a conspiracy to monopolize are the conspiracy, intent and some appreciable part of interstate commerce being affected thereby. The Trial Court as finder of fact found all of the essential elements to exist as set forth in conclusion 7 above.

The Trial Court in Findings of Fact 5, 6 and 7 (A 1572), found that the defendant, United States Steel, through its finance committee had changed the policy of the Credit Corporation to set up the special financing program to be used as a tool to increase sales of house packages. He found that the Credit Corporation had refused to relieve Fortner Enterprises of the tie (A 1577) and that the Credit Corporation took steps to enforce the tie and to foreclose on Plaintiff's property (A 1577-1578).

The Trial Court as fact finder found that the conspiracy was implemented by the making of the many loans completing the tie-in provisions and that the sole

purpose of the special financing program on the Credit Corporation was to increase United States Steel's share of the market in prefabricated house packages which is the necessary evidence of intent required under the decided cases (A 1603-1604).

Millions of dollars of house package sales were made as a part of tie-in arrangements imposed by the Credit Corporation upon builder borrowers. With certain minor exceptions, all of the Credit Corporation's loans contained the tie-in provision requiring purchase of prefabricated house packages from the Homes Division of United States Steel, particularly those loans involving land acquisition and development.

Petitioners had the opportunity to and did argue all of the facts and inferences concerning the conspiracy to monopolize charge which they now argue before this Court. The fact finder rejected their position and found contrary to that position based upon sufficient evidence.

Defendants have repeatedly relied upon attempt to monopolize cases where generally the nature of the intent and evidence of conduct required for a violation have been more stringent. This is illustrated for example by *Times Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 626 (1953), a simple refusal to deal case involving an attempt to monopolize charge.

In this case, United States Steel's own documents show that they embarked upon the special financing program with the specific intent of increasing their share of the prefabricated house package market. We have previously cited as did the District Court as fact

finder the finance committee minutes of United States Steel Corporation.

Mr. Fortner testified that he made an attempt to be relieved of the requirement of having to buy house packages from the Homes Division and was threatened with enforcement of the provisions of the Loan Agreement. Fortner Enterprises attempted for some months thereafter to comply and finally were unable to do so, so a meeting was held at which time they sought to be relieved of the restriction so that they could build a non-defective conventional home and pay the loans off. They were told that the Credit Corporation didn't care whether the house packages were good, bad or indifferent, they were going to enforce the provisions of the Loan Agreement. At that time, Fortner Enterprises was not in default in any of its payments.

This Court in 1969 held that there was sufficient evidence in the record to allow us to go to trial on our conspiracy to monopolize charges. Most of the evidence relied upon was in the record before the Supreme Court in 1969. If the evidence had been insufficient, as Petitioners now argue, the Supreme Court in 1969 could have held that we were entitled to go to trial under our Section 1 charges and that the summary judgment had been properly sustained as to the Section 2 charges. This was not done.

The Trial Judge as fact finder weighed the evidence and determined that there was sufficient evidence to establish a conspiracy to monopolize violative of Section 2 of the Sherman Act.

This Court likewise need not reach that point, however, since an affirmance of the per se violation under

Section 1 of the Sherman Act will establish the requisite violation and groundwork for the judgment entered in favor of Fortner Enterprises.

CONCLUSION

The only *valid* criticism of this Court's 1969 decision in this case is that of the commentators who have pointed out that there should be no distinction between a tie-in agreement illegal under Section 1 of the Sherman Act and a tie-in agreement illegal under the Clayton Act.[3] The Clayton Act merely requires proof of the existence of the tie-in agreement and that a not insubstantial amount of interstate commerce in the tied product be affected. It eliminates the requirement of proof of economic power in the tying product. Logically, there is no reason for a requirement of proof of economic power when you are involved with allegedly abstract type things such as loans or services and to not require proof of economic power when you are involved with allegedly more concrete things in the form of products.

This Court's 1969 decision has not caused havoc in the business community or in our courts. Outside the scattering of articles written within a year after the opinion was handed down, many of those articles having been written by law students or unidentified writers, there certainly has not been put in print any extensive discussions or criticisms of this case. The cases themselves which have cited or relied upon the Fortner deci-

[3]See 55 Cornell L. Rev. 161 (1970), and Recent Trends in Supreme Court Antitrust Decisions: Commentary—Past, Present and Future, 38 Antitrust L. J. 602, 616-618 (1969).

sions appear generally to have applied the principles enunciated in the 1969 decision quite logically and properly.

The only significant difference in circuits involving Fortner and its principles appear between the Sixth Circuit in Fortner itself and the Fourth Circuit in the *Advance Business Systems* v. *SCM Corporation* case, *supra,* but that difference in circuits actually is in Fortner's favor. The Advance Business Systems' decision certainly would have justified the directed verdict given Fortner on liability at the close of the 1970 trial of this case. The Sixth Circuit's more stringent view of this Court's 1969 Fortner decision still leaves us with an affirmance of the District Court's Findings of Fact and Conclusions of Law.

Under the above circumstances, it was therefore somewhat surprising to respondent, Fortner Enterprises, when the Petition for Writ of Certiorari was granted at this point when we thought we finally had this protracted litigation completed.

In 1969, this Court held that there were fact issues which required a trial. That trial was held in 1970 and resulted in a directed verdict in Fortner Enterprises' favor on liability at the close of all the proof. In 1971, the Sixth Circuit felt that there were certain fact issues and inferences for a jury or fact finder concerning the economic power aspect of the case and reversed for a limited trial in that area. Both parties, as required by the rules, agreed to waive a jury trial at that point and and to allow the Trial Court who was most familiar with the case to decide as fact finder the economic power

issue and this was done. We thereby eliminated any technical questions involving introduction of evidence and form and extent of instructions.

The applicable legal standards have been established and properly followed by the District Court as judge and fact finder and by the Sixth Circuit in affirming on appeal. We cannot believe that the Supreme Court would involve itself in questions of sufficiency of evidence. The only real question in any appeal of this case is whether or not there was sufficient evidence to sustain the findings of the District Court as fact finder and whether or not the findings were clearly erroneous. There was sufficient evidence to sustain the findings and the findings were not clearly erroneous as held by the Sixth Circuit below.

It is respectfully submitted that Petitioners in this case did commit a per se violation of Section 1 of the Sherman Act and did conspire to monopolize in violation of Section 2 of the Sherman Act and that the judgment entered according to those findings should be affirmed.

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